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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS M. CARMONA,

Defendant and Appellant.

B183388

(Los Angeles County
Super. Ct. No. TA075585)

APPEAL from a judgment of the Superior Court of Los Angeles County, Allen J. Webster, Jr., Judge. Reversed in part, affirmed in part, and remanded.

Waldemar D. Halka, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Edmund G. Brown Jr., Attorneys General, Robert R. Anderson, Dane R. Gillette, Chief Assistant Attorneys General, Pamela C. Hamanaka, Assistant Attorney General, Margaret E. Maxwell, Lawrence M. Daniels and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Luis M. Carmona appeals from the judgment of conviction entered following a jury trial that resulted in his conviction of oral copulation of a person under 14 (Pen. Code, § 288a, subd. (c));¹ count 1), sodomy of a person under 14 with a 10-year age difference (§ 286, subd. (c); counts 2-3, 6-9), lewd act upon a child (§ 288, subd. (a); counts 4, 5), and continuous sexual abuse (§ 288.5, subd. (a); count 10) and true findings on the multiple victim allegation (§ 667.61, subd. (b); counts 4, 5, 10) under the One Strike law (§ 667.61 et seq.). Appellant was sentenced to prison to consecutive terms of 15 years to life on counts 4 and 10; a concurrent term of 15 years to life on count 5; and the 8-year upper term on counts 1 through 3 and 6 through 9, to be served concurrently.²

Appellant contends his rights to a jury trial and due process (U.S. Const., 6th & 14th Amends.) were abridged, because the jury was not required to decide by proof beyond a reasonable doubt whether the charged crimes were barred by the applicable statute of limitations.

He contends: (1) his convictions as to counts 1 through 5 should be overturned, because the verdicts on their face, as construed with the information, establish the charged crimes occurred outside the six-year statute of limitations; (2) these convictions are also infirm, because the trial court did not instruct the jury on the need for corroboration, a necessary element of tolling; (3) his count 5 conviction also is defective

¹ All further section references are to the Penal Code.

² A conflict exists between the clerk's transcript and reporter's transcript as to which counts the trial court imposed the 8-year upper term. The clerk's transcript recites the court imposed the 8-year upper term on counts 1 through 3 and 6 through 9. In contrast, the reporter's transcript recites the 8-year upper term was imposed "with respect to counts one through ten." Immediately preceding this statement, however, the court separately announced the sentences on each of counts 4, 5, and 10 as 15 years to life pursuant to section 667.61. The clerk's transcript also recites that 15 years to life is the sentence imposed on each of counts 4, 5, and 10. In view of the internal inconsistency of the reporter's transcript, we deem the clerk's transcript to be the correct record of the counts upon which the 8-year upper term were imposed. (See, e.g., *People v. Smith* (1983) 33 Cal.3d 596, 599; *People v. Ritchie* (1971) 17 Cal.App.3d 1098, 1103-1104; *In re Evans* (1945) 70 Cal.App.2d 213, 216.)

in that the evidence was insufficient to corroborate the alleged lewd act and to establish the act involved “substantial sexual conduct”; and (4) his convictions as to counts 6 through 10 should be overturned based on the bar of the six-year statute of limitations, because: (a) the People failed properly to plead an exception to the bar; (b) the statute of limitation issues were never submitted to the jury; and (c) it cannot be determined whether the jury convicted appellant of crimes that occurred within or outside the statute of limitations bar. Alternatively, he contends he was denied effective assistance of counsel by his attorney’s failure to raise the statute of limitations at trial. He also contends his convictions as to counts 6 through 9 should be vacated, because he cannot be convicted of the crimes underlying these counts and continuous sexual abuse (count 10) committed during the same timeframe.

Appellant challenges his sentence on the grounds: (1) Fifteen years to life for continuous sexual abuse (count 10) is an unauthorized sentence; (2) The concurrent term of 15 years to life on count 5 must be vacated, because it constitutes (a) double punishment (§ 654), (b) double jeopardy, (c) cruel or unusual (or both) punishment, and (d) an unauthorized sentence under subdivision (f) of section 667.61; (3) Reversal of the upper terms on counts 1 through 3 and 6 through 9 is mandated in the absence of a true finding beyond a reasonable doubt of the aggravating factors by a jury; and (4) Reversal of the consecutive sentences is mandated for the same reason.

Respondent contends the judgment must be modified to reflect the imposition of a cumulative \$180 security fee and to order appellant to submit to AIDS testing.³ Additionally, respondent argues that the information should be amended to allege the One Strike multiple victim circumstance applies to the crime charged in count 6 rather than the count 10 conviction, which respondent contends must be reversed rather than his convictions in counts 6 through 9.

³ “AIDS” is an acronym for “acquired immune deficiency syndrome.” (§ 1202.1, subd. (a).)

By letter, we invited the parties to file supplemental briefing on the issues of whether: (1) the trial court imposed an unauthorized sentence by failing to order appellant to comply with the mandatory DNA⁴ collection requirements of section 296; (2) the judgment must be modified to reflect appellant is ordered to comply with section 296; and (3) the trial court is required to prepare an amended abstract of judgment in compliance with subdivision (f) of section 296, which is a provision of the DNA and Forensic Identification Data Base and Data Bank Act of 1998 (the DNA Act). We have received and reviewed their responses.

We conclude that in sentencing, the trial court must order the defendant who has or may not have complied already with section 296 to submit to DNA sampling and that the court's failure to do so amounts to an unauthorized sentence that is subject to correction by the reviewing court in the first instance. Moreover, where the sentence is modified to include such order, the trial court must prepare an amended abstract of judgment that "shall indicate that the court has ordered the [defendant] to comply with the requirements of [the DNA Act] and that the [defendant] shall be included in the state's DNA and Forensic Identification Data Base and Data Bank program [DNA program] and be subject to [the DNA Act]." (§ 296, subd. (f).)

In our original opinion filed on December 21, 2006, we reversed the judgment as to appellant's convictions for sodomy (§ 286, subd. (c)) in counts 6 through 9 and modified the judgment to reflect that appellant's sentence on count 10 is the 16-year upper term, to be served consecutively to his count 4 sentence and that appellant is ordered to submit to DNA sampling and AIDS testing and to pay an aggregate \$120 security fee. In all other respects, we affirmed the judgment.

On June 11, 2008, the California Supreme Court transferred the case back to us with directions to vacate our decision and to reconsider the cause in light of *People v. Black* (2007) 41 Cal.4th 799 (*Black II*) and *People v. Sandoval* (2007) 41 Cal.4th 825.

⁴ "DNA" is an acronym for "[d]eoxyribonucleic acid." (§ 295, subd. (b)(1).)

The parties submitted additional supplemental briefing. We now remand the cause to trial court for resentencing.⁵

BACKGROUND

1. *Factual Summary.*

We view the evidence in the light most favorable to the People and presume the existence of every fact the trier could. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) This evidence established appellant sexually molested three children under the age of 14.

During the summer of 1997, seven-year-old H.E., the victim in counts 1 through 4, was molested at his grandmother's house in Los Angeles County. H.E. called appellant "uncle," although the two were not related. While H.E. was playing in a room, appellant, who was then about 25 years old, locked the door. Appellant exposed his penis and directed H.E. to orally copulate him, which he did (count 1). Appellant then pulled down H.E.'s pants and sodomized him (count 2). Later that evening, H.E. again complied with appellant's directive to orally copulate him (count 4), and afterwards, appellant sodomized H.E. a second time (count 3). H.E. reported these incidents in July 2004.

One day between 1995 and 1997, C.C. was about eight years old and was at her home in Los Angeles County when appellant, her half-brother, offered to give her money to buy candy. When C.C. reached into the pocket of his pants as directed by appellant, she found no money but felt appellant's pubic hair through a hole in the pocket (count 5). After she withdrew her hand, appellant told her to continue searching. C.C. reported this incident in July 2004.

One day in about 1995, Y.G., who was about seven years old, was at her grandmother's home in Los Angeles County when appellant, her uncle, sodomized her (count 6) and threatened to kill her if she told anyone. Over the ensuing seven years, appellant sexually molested Y.G. multiple times. On one occasion, appellant sodomized

⁵ Except for our discussion of appellant's upper term and consecutive sentences, the opinion we now file is substantially the same as the opinion we filed on December 21, 2006.

Y.G. in his van (count 7). On another occasion, in a McDonald's bathroom, and on other occasions (counts 9-10), in her grandmother's house, appellant directed her to pull on his penis, and she complied (count 10). Appellant sodomized Y.G. and unsuccessfully tried to insert his penis into her vagina on an occasion where C.C. also was present (count 9). On several other occasions between about 1995 and 2002, appellant sodomized Y.G. (count 8). Y.G. did not report these incidents until July 2004.

Appellant did not testify or present any other evidence in his defense.

2. Statute of Limitation Allegations.

The charged crimes were punishable by imprisonment in state prison for eight years or more. (See §§ 286, subd. (c) [3-6-8 years], 288, subd. (a) [3-6-8 years], 288a, subd. (c)(1) [3-6-8 years], 288.5, subd. (a) [6-12-16 years].) The accusatory pleading therefore had to be filed within six years of commission of the charged crime (§ 800) unless this limitation period were otherwise extended or tolled. The People pleaded that pursuant to section 803 the prosecution of the charged crimes was not time-barred.⁶

On December 9, 2004, an amended information was filed. The crimes in counts 1 through 4 (victim H.E.) allegedly occurred “[o]n and between May 1, 1997 and October 1, 1997.” The crime in count 5 (victim C.C.) allegedly occurred “[o]n and between January 1, 1995 and December 31, 2000.” As to counts 1 through 5, it was “further alleged, pursuant to . . . section 803[,] [subdivision (g)] . . . that the statute of limitations has been extended.” (See *People v. Linder*, *supra*, 139 Cal.App.4th at p. 81 [“effect of section 803[,] [subdivision] (g) is to permit prosecution of specified sexual offenses with a juvenile within the statute of limitations set forth in section[s] 800 and 801, or within one year of the victim’s report of the offense, whichever is later”].)

⁶ Appellant was arrested on July 18, 2004. The complaint, which is not in the record, necessarily was filed within a year of July 2004, when the crime was reported, because the preliminary hearing was held on September 27, 2004. The applicable provisions of section 803 are those in effect in 2004. “In statutory amendments to section 803 in 2005, subdivisions (f) and (g) were rewritten as subdivision (f) and former subdivision (h) was designated as subdivision (g).” (*People v. Linder* (2006) 139 Cal.App.4th 75, 78, fn. 2.)

The crimes in counts 6 through 10 (victim Y.G.) allegedly occurred “[o]n and between January 1, 1995 and December 31, 2001.” As to counts 6 through 10, it was “further alleged, pursuant to . . . section 803[,] [subdivision] (f) . . . that the victim in the above offense is under 18 years of age and reported the offense to a responsible adult and agency on 19th day of July, 2004.”

DISCUSSION

1. *Statute of Limitations Not Element of Offense.*

Appellant contends his rights to a jury trial and due process (U.S. Const., 6th & 14th Amends.) were violated, because the jury was not required to determine beyond a reasonable doubt that the charged crimes were not barred by the six-year statute of limitations. In short, he acknowledges that the statute of limitations is not an element of the crime (*People v. Frazer* (1999) 21 Cal.4th 737, 760, fn. 22), but asserts that “[b]ecause [the] statute of limitations is the ‘functional equivalent’ of an element of the crime, and proof of a statute of limitations exception *fact* increases the penalty from no punishment to statutory prescribed punishment, the right to jury trial with proof beyond a reasonable doubt is guaranteed under *Apprendi*, *Ring* and *Blakely*.”

We reject appellant’s contentions. A similar argument was advanced by the defendant and found unpersuasive by our Supreme Court, in *People v. Betts* (2005) 34 Cal.4th 1039, 1054.

In *Betts*, “[d]efendant argue[d] that he is entitled under the Sixth and Fourteenth Amendments to the federal Constitution to a jury trial on jurisdictional facts, because jurisdiction is the ‘functional equivalent’ of an element of the crime. A criminal defendant has a constitutional right to a jury trial on all the elements of the crime charged. [Citations.] The right to a jury trial extends to the proof of any fact (except a prior conviction) that increases the maximum penalty for a crime. (*Blakely v. Washington* (2004) 542 U.S. 296 [a defendant has right to jury trial on factors that are prerequisite to imposition of sentence above the standard range]; *Apprendi v. New Jersey* (2000) 530 U.S. 466 [the defendant had right to jury trial on sentencing enhancement that increased maximum incarceration for offense from 10 years to 20 years]; see *People v.*

Sengpadychith (2001) 26 Cal.4th 316.) A fact that increases the maximum permissible punishment for a crime is the functional equivalent of an element of the crime, regardless whether that fact is defined by state law as an element of the crime or as a sentencing factor. (*Blakely, supra*, 542 U.S. 296; see also *Ring v. Arizona* (2002) 536 U.S. 584 [a capital defendant has right to jury trial on aggravating factors that, under state law, make the defendant eligible for death penalty].) The decisions upon which defendant relies involve factual determinations that establish the level of punishment for which the defendant is eligible. They are inapplicable to the present issue. Because territorial jurisdiction is a *procedural* matter that relates to the authority of California courts to adjudicate the case and not to the guilt of the accused or the limit of authorized punishment, a jury trial on the factual questions that establish jurisdiction is not required by the federal Constitution.” (*People v. Betts, supra*, 34 Cal.4th at p. 1054, italics added, fns. omitted.)

In *People v. Linder, supra*, 139 Cal.App.4th 75, the court, which rejected a position substantially similar to appellant’s, explained that “the facts establishing a prosecution has been timely brought [are not] facts that effect ‘the level of punishment for which the defendant is eligible’ [citation], bringing those facts within the *Apprendi* line of cases. Even the facts establishing an extension of the statute of limitations under section 803[,] [subdivision] (g) do not result in an increase of a defendant’s punishment. This conclusion is clear from *Stogner [v. California]* (2003) 539 U.S. 607. In *Stogner*, the United States Supreme Court held section 803[,] [subdivision] (g) violated ex post facto principles to the extent it could be applied to *revive* a previously time-barred prosecution. (*Stogner, supra*, at pp. 609-610.) The court found: ‘After (*but not before*) the original statute of limitations had expired, a party such as *Stogner* was not “liable to any punishment.” California’s new statute therefore “aggravated” *Stogner*’s alleged crime, or made it “greater than it was, when committed,” in the sense that, and to the extent that, it “inflicted punishment” for past criminal conduct that (when the new law was enacted) did not trigger any such liability.’ (*Id.* at p. 613, italics added.) That is, only revival of a time-barred prosecution increases the defendant’s punishment; extension

of the time for prosecution under section 803[,] [subdivision] (g) does not. [¶] As the court stated in *People v. Zandrino* (2002) 100 Cal.App.4th 74, section 803[,] [subdivision] (g) ‘does not alter the elements of these offenses, or their punishment’ [*Zandrino, supra,*] at p. 83.’ (*Linder*, at p. 85.)

In his reply brief, appellant contends *Linder* should not be considered, because a petition for review and request for depublishation is pending before our Supreme Court, and thus, it is “not yet final.” On August 16, 2006, however, review was denied and *Linder* was not ordered depublished. Alternatively, he urges “the *Linder* opinion [*sic*] was incorrectly decided and its conclusion should not be followed by this Court.” We disagree. We find the analysis and conclusions reached by the court in *Linder* to be persuasive and note appellant has provided nothing new or different which would compel us to find otherwise.

In view of the foregoing, we conclude *Apprendi* and its progeny are factually inapplicable to the time-bar of the statute of limitations, and thus, do not pertain to the validity of appellant’s convictions.

2. Statute of Limitations Not Subject to Reasonable Doubt Standard.

Appellant’s claim that the statute of limitations issues are governed by the reasonable doubt standard is not cognizable on appeal for the reason that he failed to raise the issue of that time-bar at trial. (See, e.g., *People v. Smith* (2002) 98 Cal.App.4th 1182, 1192-1193.) On the merits, we note his claim already has been rejected in *Linder* and he offers no persuasive argument or authority that would warrant revisiting this issue. (*People v. Linder, supra*, 139 Cal.App.4th at p. 85 [“prosecution’s burden of proof on the statute of limitations issue is a preponderance of the evidence and as to the independent corroboration requirement, clear and convincing evidence. [Citations.]”].)

3. Counts 1 through 5 Convictions Not Time-Barred.

Appellant contends his convictions as to counts 1 through 5 should be overturned, because the verdicts on their face, as construed with the information, establish the charged crimes occurred outside the six-year statute of limitations. We disagree.

The fatal flaw in appellant's position is his failure to recognize that the prosecution alleged in the information that the statute of limitations was tolled under specific provisions of the Penal Code. His failure to demur to the information amounted to forfeiture of any perceived lack of specificity or uncertainty on his part regarding the facts underlying the particular allegation as to each of these counts. (See, e.g., *People v. Thomas* (1986) 41 Cal.3d 837, 843 [waiver of any uncertainty by failure to demur].) His failure to raise the statute of limitations issue at trial amounted to waiver of its time-bar, and the inapplicability of this time-bar was not an element of any charged crime that the jury had to find existed.

"In California the statute of limitations constitutes a substantive right. [Citation.] The prosecution bears the burden of pleading and proving the charged offense was committed within the applicable period of limitations. [Citation.] Where the pleadings do not show as a matter of law the prosecution is time barred, the statute of limitations becomes an issue for the jury (trier of fact) if *disputed by the defendant*. [Citations.] However, 'the statute of limitations is not an "element" of the offense insofar as the "definition" of criminal conduct is concerned.' [Citations.] Although the right to maintain the action is an essential part of the final power to pronounce judgment, that right 'constitutes no part of the crime itself.' [Citation.]" (*People v. Linder, supra*, 139 Cal.App.4th at p. 84, italics added.)

4. No Reversible Jury Instruction Error as to Counts 1 through 5.

Appellant contends his convictions as to counts 1 through 5 must be vacated for the reason the trial court failed to instruct the jury on the requirement of corroboration, a necessary element of tolling the statute of limitations, which error was exacerbated by the court instructing that the testimony of a single witness was sufficient to sustain a conviction. There was no error.

Appellant did not raise the bar of the statute of limitations at trial, nor did he request any instructions on the statute of limitations. He therefore has forfeited any instructional claim of error in this regard. (See, e.g., *People v. Smith, supra*, 98 Cal.App.4th at p. 1192 [instruction on statute of limitations mandated only if placed at

issue by the defense as a factual matter at trial].) We note that the complained of one witness instruction (CALJIC No. 2.27) is a correct statement of the law and, in view of such forfeiture, it does not implicate any instructional error.

5. Any Statute of Limitations Evidentiary Deficiency Forfeited.

Appellant contends his count 5 conviction is defective, because there was insufficient evidence to corroborate the alleged lewd act and the act did not involve “substantial sexual conduct.” We find appellant misapprehends the burden of proof in this regard. Having pled the statute of limitations was tolled, the People were not required to prove the bar of the statute of limitations did not apply. (*People v. Williams* (1999) 21 Cal.4th 335, 344 [although no forfeiture of statute of limitations bar if expired as a matter of law, defendants “may certainly lose the ability to litigate factual issues such as questions of tolling”].) Rather, it was incumbent on appellant to raise the bar of the statute of limitations in the first instance. His failure to do so waived any factual issues regarding whether the statute of limitations was tolled. (See, e.g., *Williams*, at p. 345 [“ ‘[W]hen the pleading is facially sufficient, the issue of the statute of limitations is solely an evidentiary one’ ”].)

6. Statute of Limitations Bar as to Counts 6 through 10 Forfeited.

Appellant contends his convictions in counts 6 through 10 should be overturned based on the bar of the six-year statute of limitations, because: (1) the People failed properly to plead an exception to the bar; (2) the statute of limitation issues were never submitted to the jury; and (3) it cannot be determined whether the jury convicted appellant of crimes that occurred within or outside the statute of limitations bar. Appellant’s contentions are unsuccessful.

As we have discussed above, appellant forfeited any perceived deficiency regarding how the tolling of the statute of limitations was pled by failing to demur. He cannot raise this ground for the first time on appeal. (*People v. Thomas, supra*, 41 Cal.3d at p. 843.)

Moreover, by failing to raise the statute of limitations, the time-bar of the statute of limitations or its tolling was not before the jury. For this reason, no claim of error is

cognizable regarding whether the crimes of which appellant was convicted occurred within or outside the time-bar of the statute of limitations.

7. No Ineffective Assistance of Counsel Shown.

Appellant contends he was denied effective assistance of counsel to the extent his attorney's failure to raise the time-bar of the statute of limitations at trial forfeited his claim on appeal. "We will reverse on 'ineffective assistance of counsel' grounds 'only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission.' [Citation.]" (*People v. Rich* (1988) 45 Cal.3d 1036, 1096.)

The record here does not reflect that the omission to raise the time-bar of the statute of limitations at trial was not the product of a rational tactical choice. Appellant's attorney did make a motion for acquittal (§ 1118), which the trial court denied.⁷ He may have decided, as a tactical matter, that proceeding on the theory that the People had failed to present sufficient evidence to prove appellant's guilt beyond a reasonable doubt was a stronger defense than raising the time-bar of the statute of limitations. The record thus does not establish that his attorney did not have a tactical reason for not asserting the statute of limitations at trial. Accordingly, appellant has failed to sustain his burden on appeal. (See, e.g., *People v. Coddington* (2000) 23 Cal.4th 529, 651-652, overruled on other grounds by *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; *People v. Ochoa* (1998) 19 Cal.4th 353, 463; *People v. Colligan* (1979) 91 Cal.App.3d 846, 851.)

8. Counts 6 Through 9 Reversed.

Appellant contends his convictions as to counts 6 through 9 should be vacated, because he cannot be convicted of the crimes underlying these counts and continuous sexual abuse (count 10) committed during the same timeframe. Respondent concedes that appellant cannot be convicted of both the substantive crimes and the continuous sexual abuse offense but argues that only count 10 needs to be reversed.

⁷ At the preliminary hearing, counsel also made a motion to dismiss based on insufficient evidence. He affirmatively represented no affirmative defense was asserted, and he did not raise any statute of limitations issues.

The appropriate solution is to preserve whatever conviction(s) would allow imposition of the greatest sentence and reverse the other conviction(s). (See, e.g., *People v. Torres* (2002) 102 Cal.App.4th 1053, 1059-1060; *People v. Alvarez* (2002) 100 Cal.App.4th 1170, 1177-1178.)

At the time defendant was sentenced, the One Strike multiple victim circumstance (mandating 15 years to life sentence) was inapplicable to continuous sexual abuse (count 10), because that offense (§ 288.5, subd. (a)) was not a qualifying offense under the One Strike law (*People v. Palmer* (2001) 86 Cal.App.4th 440, 445 [review den.]; see former § 667.61, subds. (b), (c), & (e)(5)).⁸ The trial court therefore imposed an unauthorized sentence by imposing a term of 15 years to life on count 10. Accordingly, the issue at hand must be resolved in the context of what conviction(s) would result in the greatest sentence in the absence of the One Strike law.

The maximum punishment for continuous sexual abuse is 16 years. (§ 288.5, subd. (a).) If consecutive, rather than concurrent sentences, were imposed on the other four counts,⁹ the sentence on these counts would be an aggregate of 14 years, consisting of the 8-year upper term on count 6, plus 2 years, or one-third the 6-year middle term (§ 286, subd.(c)(1)) for the remaining three counts. Absent more, appellant's continuous sexual abuse conviction should stand and the other four sexual offense convictions should be reversed.

Respondent urges the matter should be remanded to allow the People to amend the information "to switch" the multiple victim circumstance from count 10 to the count 6 sodomy offense, which would then trigger the 15-year-to-life term as to count 6. Respondent argues the concurrent sentences on counts 7 through 9 would remain

⁸ Section 667.61 has since been amended. It now provides that continuous sexual abuse of a child in violation of section 288.5 is subject to the One Strike law. (§ 667.61, subd. (c)(9).)

⁹ In these counts, appellant was convicted of sodomy of a person under 14 with a 10-year age difference (§ 286, subd. (c); counts 6-9).

unchanged and “[t]his amendment is appropriate as it timely cures an immaterial defect in the information” and “appellant’s overall sentence [thus] remains the same as that initially imposed by the trial court.”

We do not find respondent’s position persuasive. A 15-years-to-life sentence based on a multiple victim circumstance under the One Strike law is not mandated simply because such circumstance is alleged in the information. Rather, it must be pled and proved and found true by the trier of fact. In this instance, the trier of fact was the jury, which found the circumstance alleged as to count 10 true. That jury already has been discharged. Respondent cites no authority, and none have been found, that would allow this matter to be remanded solely for the purpose of pleading a multiple circumstance allegation as to an offense of which the defendant is convicted and that conviction is not overturned on appeal with directions for a new trial. (See *People v. Mancebo* (2002) 27 Cal.4th 735, 749 [One Strike special circumstance must be pled and proved and found true by trier of fact; due process also implicated; waiver and estoppel based on People’s exercise of charging discretion].)

In view of the foregoing, we conclude the judgment must be reversed as to appellant’s convictions in counts 6 through 9 and an amended abstract of judgment must be prepared deleting all references to his sentences on these counts.

9. The Upper Term Sentences and the Sentence on Count 10.

Appellant contends his sentence of 15 years to life for continuous sexual abuse (count 10) is unauthorized. We agree. The One Strike multiple victim circumstance (mandating 15 years to life sentence) is inapplicable to continuous sexual abuse (count 10), because that offense (§ 288.5, subd. (a)) was not a qualifying offense under the One Strike law at the time appellant was sentenced. (*People v. Palmer, supra*, 86 Cal.App.4th at p. 445; former § 667.61, subds. (b), (c), & (e)(5).) The trial court’s unauthorized sentence of 15 years to life therefore must be reversed.

Noting that a violation of section 288.5 shall be punished by term of 6, 12 or 16 years, we previously concluded that the trial court’s clear intent was to impose the 16-year upper term. Upon reconsideration of the sentencing issue in light of *People v. Black*,

supra, 41 Cal.4th 799 and *People v. Sandoval*, *supra*, 41 Cal.4th 825, we now conclude that this matter must be remanded to the trial court as to resentencing on all counts, including count 10, but excluding counts 6 through 9, which have been reversed.

In *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*), the United States Supreme Court reaffirmed *Apprendi v. New Jersey* (2000) 530 U.S. 466, 476, and *Blakely v. Washington* (2004) 542 U.S. 296, and overruled *People v. Black* (2005) 35 Cal.4th 1238 (*Black I*). *Cunningham* held that California's determinate sentencing law violates a defendant's right to a jury trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution to the extent that the law authorizes the trial judge to find facts (other than a prior conviction) that expose a defendant to an upper term sentence by a preponderance of the evidence. "This Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." (*Cunningham, supra*, at p. 281.)

After *Cunningham*, our California Supreme Court, in *Black II*, reexamined California's determinate sentencing system and held that the existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for the upper term: "[I]mposition of the upper term does not infringe upon the defendant's constitutional right to jury trial so long as one legally sufficient aggravating circumstance has been found to exist by the jury, has been admitted by the defendant, or is justified based upon the defendant's record of prior convictions." (*Black II, supra*, 41 Cal.4th at p. 816.)

Sandoval concluded that the harmless error standard in *Chapman v. California* (1967) 386 U.S. 18, 24, applies to *Cunningham* error. (*People v. Sandoval, supra*, 41 Cal.4th at p. 838.) In applying that standard "we must determine whether, if the question of the existence of an aggravating circumstance or circumstances had been submitted to the jury, the jury's verdict would have authorized the upper term sentence." (*Ibid.*) "[I]f a reviewing court concludes, beyond a reasonable doubt, that the jury, applying the beyond-a-reasonable-doubt standard, unquestionably would have found true at least a

single aggravating circumstance had it been submitted to the jury, the Sixth Amendment error properly may be found harmless.” (*Id.* at p. 839.)

The problem here is the trial court never considered aggravating circumstances, if any, with respect to count 10. Instead, the court was under the mistaken belief it had to impose a 15-years-to-life sentence on that count under the One Strike law. The trial court therefore never considered sentencing defendant with the 6-12-16 year range in section 288.5. Nor can we determine, beyond a reasonable doubt, that had the trial court known it could sentence within that range, it would have found true an aggravating circumstance. When sentencing appellant, the trial court alluded to the seriousness of the crimes and that they involved “a number of children who were impressionable victims,” but the court did not clearly connect this statement to an appropriate aggravating circumstance. And although the appellant has a 2001 misdemeanor DUI conviction, the trial court cited his prior background as a factor in mitigation. Because we conclude that the cause must be remanded for resentencing on count 10, the cause must be remanded so that the trial court can exercise its discretion in imposing a new sentence as to all counts, except counts 6 through 9, which have been reversed.

To further guide the trial court, we also note that nothing in *Black II* prohibits the imposition of consecutive sentences. *Black II* found that nothing in *Cunningham* “undermine[s] our previous conclusion that imposition of consecutive terms under section 669” implicates a defendant’s Sixth Amendment rights.¹⁰

10. Count 5 One Strike Sentence Not Unauthorized or Unconstitutional.

Appellant contends the count 5 concurrent term of 15 years to life under the One Strike law is an unauthorized sentence, because the use of the multiple victim

¹⁰ The United States Supreme Court has granted certiorari in *State v. Ice* (2007) 343 Or. 248 [170 P.3d 1049], cert. granted in part by *Oregon v. Ice* (2008) 128 S.Ct. 1657. The question presented is whether the Sixth Amendment, as construed in *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, and in *Blakely v. Washington*, *supra*, 542 U.S. 296, requires that facts, other than prior convictions, necessary to imposing consecutive sentences be found by the jury or admitted by the defendant.

circumstance three separate times violated: (1) the multiple punishment bar of section 654; (2) the prohibition against double jeopardy; (3) the proscription against cruel or unusual (or both) punishment; and (4) subdivision (f) of section 667.61. We disagree.

Section 654 is factually inapplicable in this situation. One life term for each victim on each occasion is mandated under subdivision (g) of section 667.61. Section 654, which precludes punishment under different penalty provisions for a single act or omission, is inapplicable where multiple victims are involved, and the applicability of section 654 was rejected by the court in *People v. DeSimone* (1998) 62 Cal.App.4th 693 at page 700, which decision we find persuasive. Similarly, the prohibition of the Double Jeopardy Clause (U.S. Const., 5th Amend.) against multiple punishment for the same offense is factually inapposite where, as here, the statute expressly authorizes the punishment. (*DeSimone*, at p. 700.)

Appellant contends his count 5 concurrent sentence of 15 years to life constitutes cruel or unusual punishment based on the use of the One Strike multiple victim circumstance to elevate the determinate term to an indeterminate life term and then use of that life term to impose a life term on a conviction in another count.

His claim of cruel or unusual punishment is not cognizable on appeal, because he failed to assert it at trial.¹¹ (See *People v. Collins* (2004) 115 Cal.App.4th 137, 156; *People v. Norman* (2003) 109 Cal.App.4th 221, 229.) On the merits, we conclude appellant has failed to carry his burden. His sentence of 15 years to life for committing a lewd act on his half-sister through a ruse does not amount to cruel or unusual punishment (U.S. Const., 8th Amend.). (See *Lockyer v. Andrade* (2003) 538 U.S. 63, 66, 77 [50-years-to-life sentence for two counts of petty theft with prior not cruel and unusual punishment].) Mere length of imprisonment is insufficient to demonstrate the punishment is so disproportionate “that it shocks the conscience and offends fundamental

¹¹ In his reply brief, appellant concedes he “does not claim the punishment as applied to him is cruel and/or unusual [punishment]. Rather, he makes a purely legal argument that the double use of his current convictions under the One Strike statute results in unconstitutional punishment.”

notions of human dignity.” (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted), and thus, amounts to cruel or unusual punishment (Cal. Const., art I., § 17). (See *People v. Snow* (2003) 105 Cal.App.4th 271, 284 [length of total sentence inconsequential to analysis of punishment as cruel and unusual]; see also *People v. Byrd* (2001) 89 Cal.App.4th 1373, 1382-1383.) Moreover, appellant has failed to show his sentence is greater than that for more serious offenses in California. (See, e.g., *People v. Wingo* (1975) 14 Cal.3d 169, 174-175; see also *People v. Wutzke* (2002) 28 Cal.4th 923, 930-931 [section 667.61, subdivision (e)(5) reflects Legislature’s view that most dangerous are defendants who commit sex crimes against multiple victims and thus should be subject to separate life term for each victim attacked on a separate occasion].)

We next review the One Strike law in its entirety and construe its provisions to harmonize to the extent possible and not construe any provision to defeat any other provision. (See, e.g., *People v. Acosta* (2002) 29 Cal.4th 105, 112.) Appellant’s position that subdivision (f) of section 667.61 precludes the multiple use of a multiple victim allegation is unsupported by a plain reading of the language of that subdivision,¹² and his position would nullify subdivision (g) of section 667.61 that allows such usage where a defendant commits qualifying crimes against multiple victims. We therefore decline to adopt his position.

11. Payment of \$120 Security Fee Mandated.

Respondent contends the trial court erred in failing to order appellant to pay a \$20 security fee on each of his convictions in counts 1 through 9, in the aggregate amount of \$180. We agree in part. The trial court was required to impose this fee as to counts 1

¹² In pertinent part, subdivision (f) of former section 667.61 provides: “If only the minimum number of circumstances specified in subdivision (d) or (e) which are required for the punishment provided in subdivision (a) or (b) to apply have been pled and proved, that circumstance or those circumstances shall be used as the basis for imposing the term provided in subdivision (a) or (b) rather than being used to impose the punishment authorized under any other law, unless another law provides for a greater penalty.”

through 5 and count 10. As we discussed above, appellant’s convictions in counts 6 through 9, not count 10, must be reversed and vacated.

The record reflects the trial court did not impose a security fee in any amount in sentencing appellant. This omission constituted unauthorized sentencing error. Section 1465.8, subdivision (a)(1), provides that “[t]o ensure and maintain adequate funding for court security, a fee of twenty dollars (\$20) shall be imposed on every conviction for a criminal offense” This fee is not subject to a defendant’s ability to pay and is mandatory, nor is this fee subject to waiver or forfeiture by the People’s failure to object to its omission below. (See *People v. Smith* (2001) 24 Cal.4th 849, 852-853 [mandatory parole revocation fine]; *People v. Turner* (2002) 96 Cal.App.4th 1409, 1413-1414 [laboratory fee and penalty assessments].)

Appellant contends “[t]he requested fee must not be imposed because any application of section 1465.8 to appellant’s case would violate California law [§ 3] and the constitutional prohibition against ex post facto laws [U.S. Const., 5th Amend.; Cal. Const., art. I, § 15].” The California Supreme Court has confirmed that the security fee is not punitive in nature and does not violate ex post facto laws. (*People v. Alford* (2007) 42 Cal.4th 749, 757.)

The judgment therefore must be modified to reflect appellant is ordered to pay a \$20 security fee on counts 1 through 9 and count 10 in the aggregate amount of \$120. The abstract of judgment must be amended accordingly.

12. Order for Compliance with DNA Act Mandated.

In sentencing appellant, the trial court did not order him to submit to mandatory DNA sampling.¹³ (§ 296, subds. (a)(1), (2)(A) & (d).) The reporter’s transcript reflects

¹³ DNA sampling transpires when a qualified person “provide[s] buccal swab samples, right thumbprints, and a full palm print impression of each hand, and any blood specimens or other biological samples required pursuant to [the DNA Act] for law enforcement identification analysis[.]” (§ 296, subd. (a).) DNA samples thus consist of these samples, print impressions, and specimens.

the requirement of DNA sampling was not addressed. As we shall discuss, the trial court's failure to order appellant to submit DNA samples constitutes an unauthorized sentence, which must be corrected to reflect such order, and the trial court must be directed to prepare an amended abstract of judgment in accordance with the DNA Act.

a. *Applicable Principles of Statutory Construction.*

“[O]ne of the guiding principles of statutory construction [is] that significance be accorded every word of an act. [Citation.]” (*People v. Johnson* (2002) 28 Cal.4th 240, 246-247.) “We must also avoid a construction that would produce absurd consequences, which we presume the Legislature did not intend. [Citations.]” (*People v. Mendoza* (2000) 23 Cal.4th 896, 908.) Moreover, “ ‘[t]he Legislature “is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof.” ’ [Citation.]” (*People v. Jackson* (1998) 66 Cal.App.4th 182, 192.)

“ ‘When construing a statute, we must “ascertain the intent of the Legislature so as to effectuate the purpose of the law.” ’ [Citations.] ‘In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose.’ [Citation.] At the same time, ‘we do not consider . . . statutory language in isolation.’ [Citation.] Instead, we ‘examine the entire substance of the statute in order to determine the scope and purpose of the provision, construing its words in context and harmonizing its various parts.’ [Citation.] Moreover, we ‘ “read every statute ‘with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.’ ” ’ [Citations.] ‘These rules apply equally in construing statutes enacted through the initiative process.’

[Citation.]”¹⁴ (*State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1043.)

b. *Evolution of DNA Act.*

Prior to enactment of the DNA Act, former “[s]ection 290.2 state[d] in relevant part: ‘(a) Any person . . . who is convicted of a felony offense of assault or battery in violation of Section . . . 245 . . . and who is committed to a state prison . . . shall be required to provide two specimens of blood and a saliva sample to that institution [¶] . . . [¶] (c) The Department of Justice shall provide all blood specimen vials, mailing tubes, labels, and instructions for the collection of the blood specimens, saliva samples, and thumbprints. The specimens and samples shall thereafter be forwarded to the Department of Justice for analysis of deoxyribonucleic acid (DNA) and other genetic typing analysis at the department’s DNA laboratory.’ ” (*People v. Hong* (1998) 64 Cal.App.4th 1071, 1075, fn. 3.)

In *Hong*, the court first concluded that this “testing requirement need not be imposed by a court. Section 290.2, subdivisions (a) and (b), requires the Department of Corrections to conduct the testing regardless of any court order. Once a prisoner has been convicted of an enumerated offense, the testing requirement is automatic.” (*People v. Hong, supra*, 64 Cal.App.4th at p. 1083, fn. omitted.) The court pointed out, “[o]n the other hand, it is common for trial judges to orally articulate the testing requirement [citation]” and then concluded “[s]ince the trial court orally directed that the testing occur and it is mandatory that it take place, . . . this aspect of the oral pronouncement of sentence must be reflected on the abstract of judgment.” (*Id.* at pp. 1083-1084.) The abstract of judgment is not part of the judgment. Indeed, “ ‘[b]y its very nature, definition and terms . . . it cannot add to or modify the judgment which it purports to

¹⁴ “If a statute is ambiguous, we consider other indicia of the voters’ intent, such as the analyses and arguments contained in the official ballot pamphlet. [Citation.]” (*Farmers Ins. Exchange v. Superior Court* (2006) 137 Cal.App.4th 842, 851.) We have reviewed these matters in conjunction with our consideration of the voters’ intent and purpose and the language of Proposition 69.

digest or summarize.’ (*People v. Hartsell* (1973) 34 Cal.App.3d 8, 14.)” (*People v. Mesa* (1975) 14 Cal.3d 466, 471.)

“The Legislature enacted the DNA Act in 1998 as a replacement to section 290.2. (See Stats. 1998, ch. 696, §§ 1, 2.) By the time of its repeal, section 290.2 required any person who was convicted of murder, felony assault, felony battery or specified sex offenses and who was confined in a penal institution or granted probation, to provide ‘two specimens of blood and a saliva sample.’ (See Stats. 1983, ch. 700, § 1, pp. 2680-2681; Stats. 1996, ch. 917, § 2.) . . .

“The author of the DNA Act explained that one of the primary reasons for replacing section 290.2 was the desire to close loopholes in that law. (Assem. Com. on Public Safety, Analysis of Assem. Bill No. 1332 (1997-1998 Reg. Sess.) as introduced Feb. 28, 1997, coms. (2) & (3).) The new legislation was intended to reach a broader class of offenders and apply regardless of the sentence imposed or the disposition rendered. (Legis. Counsel’s Dig., Introduction of Assem. Bill No. 1332 (1997-1998 Reg. Sess.) Feb. 28, 1997, p. 1.)

“The findings and purpose of the DNA Act are also set forth in the [A]ct’s first article. (See § 295.) There, the Legislature reiterates its intent to clarify existing law and make the state’s DNA and forensic identification data base and data bank a ‘more effective law enforcement tool’ so as to allow for the ‘expeditious detection and prosecution’ of sex offenders and other violent criminals. ([Former] § 295, subds. (b)(3) & (c); see also Legis. Counsel’s Dig., Introduction of Assem. Bill No. 1332 (1997-1998 Reg. Sess.) Feb. 28, 1997, p. 1.)” (*People v. Brewer* (2001) 87 Cal.App.4th 1298, 1301-1302.)

The DNA Act was amended by the voter initiative measure known as the “DNA Fingerprint, Unsolved Crime and Innocence Protection Act,” or Proposition 69 (Prop. 69), which was adopted on November 2, 2004. The measure made certain changes to the DNA Act, including expanding the categories of persons subject to DNA sampling and requiring the timely collection and analysis of the samples. (Official Voter Information Guide, Analysis by the Legislative Analyst, p. 60.)

In pertinent part, Prop. 69 provided:

“The people of the State of California do hereby find and declare that: [¶] . . . [¶] (e) The state has a compelling interest in the accurate identification of criminal offenders, and DNA testing at the *earliest stages* of criminal proceedings for felony offenses will help thwart criminal perpetrators from concealing their identities and thus prevent time-consuming and expensive investigations of innocent persons. [¶] (f) . . . [I]t is reasonable to expect qualifying offenders to provide forensic DNA samples for the limited identification purposes set forth in [the DNA Act]. [¶] (g) Expanding the statewide DNA Database and Data Bank Program is the most reasonable and certain means to ensure that persons wrongly suspected or accused of crime are *quickly exonerated* so that they may reestablish their standing in the community.” (Prop. 69, § II, italics added.)

As amended, section 295 provides: “It is the intent of the people of the State of California, in order to further the purposes of [the DNA Act], to require DNA and forensic identification data bank samples from *all persons*, including juveniles, for the felony and misdemeanor offenses described in subdivision (a) of Section 296.” (§ 295, subd. (b)(2), italics added.) Subdivision (c) of that section was amended to read in pertinent part that the purpose of the DNA Program is to assist “in the expeditious *and accurate* detection and prosecution of individuals responsible for sex offenses *and other crimes*, the exclusion of suspects who are being investigated for these crimes, and the identification of missing and unidentified persons, particularly abducted children.” (§ 295, subd. (c), italics added.)

The following classes of persons are subject to mandatory DNA sampling:

(1) Any adult person who is arrested for or charged with any of certain enumerated felonies, including attempted, offenses (§ 296, subd. (a)(2) & (4));¹⁵ (2) Any person who

¹⁵ These enumerated offenses are: “(A) Any felony offense specified in Section 290 or attempt to commit any felony offense described in Section 290, or any felony offense that imposes upon a person the duty to register in California as a sex offender under

is required to register as a sex offender by reason of the commission or attempted commission of a felony or misdemeanor or any person housed in a mental health facility or sex offender treatment program upon referral by a court after being charged with any felony (§ 296, subd. (a)(3));¹⁶ and (3) Any person convicted of or who pled guilty or no contest to any felony offense or found not guilty by reason of insanity of any felony offense, or any juvenile who is adjudicated for committing any felony offense (§ 296, subd. (a)(1)).¹⁷

c. Court Order Mandated Although DNA Act Self-Executing.

A review of the predecessor to the DNA Act, the DNA Act, and Prop. 69 reveals that initially there was no provision for a court order directing the qualified person to submit to DNA sampling and that currently such a court order is mandated. Although the DNA Act, as amended by Prop. 69, continues to contain self-executing provisions, an order for DNA sampling serves to compel those charged with the collection of the requisite DNA samples to do so expeditiously.

Under certain circumstances, a court order is not mandated before DNA samples must be submitted. For instance, when DNA samples are collected at a county jail or other county facility, such samples must be “collected from qualifying persons immediately following arrest, conviction, or adjudication, or during the booking or intake

Section 290” and “(B) Murder or voluntary manslaughter or any attempt to commit murder or voluntary manslaughter.” (§ 296, subd. (a)(2).)

¹⁶ Section 296, subdivision (a)(3) reads: “Any person, including any juvenile, who is required to register under Section 290 or 457.1 because of the commission of, or the attempt to commit, a felony or misdemeanor offense, or any person, including any juvenile, who is housed in a mental health facility or sex offender treatment program after referral to such facility or program by a court after being charged with any felony offense.”

¹⁷ Section 296, subdivision (a)(1) reads: “Any person, including any juvenile, who is convicted of or [who] pleads guilty or no contest to any felony offense, or is found not guilty by reason of insanity of any felony offense, or any juvenile who is adjudicated under Section 602 of the Welfare and Institutions Code for committing any felony offense.”

or reception center process at that facility, or reasonably promptly thereafter.” (§ 295, subd. (i)(1)(A).) Similarly, the DNA Act requires that any adult person arrested for an enumerated felony offense shall provide DNA samples “immediately following arrest, or during the booking or intake or prison reception center process or as soon as administratively practicable after arrest, but, in any case, prior to release on bail or pending trial or any physical release from confinement or custody.” (§ 296.1, subd. (a)(1)(A).)

Moreover, any person, including any juvenile, who is imprisoned or confined or placed in a state correctional institution, a county jail, or other specified facility or treatment program “after a conviction of any felony or misdemeanor offense, or any adjudication or disposition rendered in the case of a juvenile, whether or not [a qualifying] crime or offense . . . , shall provide [DNA] samples . . . , immediately at intake, or during the prison reception center process, or as soon as administratively practicable at the appropriate custodial or receiving institution or the program in which the person is placed, if: [¶] . . . [t]he person has a record of any past or present conviction or adjudication . . . of a qualifying offense . . . or has a record of any past or present conviction or adjudication in any other court . . . of any offense that, if committed or attempted in this state, would have been punishable as [a qualifying] offense” and “[that person’s DNA samples] are not in the possession of the Department of Justice DNA Laboratory or have not been recorded as part of the department’s DNA databank program.” (§ 296.1, subd. (a)(2)(A).)

Nonetheless, the DNA Act acknowledges that these self-executing provisions may not accomplish the goal of the expeditious collection of DNA samples. To remedy this failing and to ensure that a qualifying person does not fall through the cracks, the DNA Act mandates that the court order DNA sampling.

As to any person subject to the DNA Act, “the court shall *order* the [qualifying] person to report within five calendar days to a county jail facility . . . or other designated facility to provide the required” DNA samples *if* that person did not submit such samples “immediately following arrest or during booking or intake procedures or is released on

bail or pending trial or is not confined or incarcerated at the time of sentencing or otherwise bypasses a prison inmate reception center maintained by the Department of Corrections[.]” (§ 296.1, subd. (a)(1)(B), italics added.)

Additionally, “[i]f at any stage of court proceedings the prosecuting attorney determines that [DNA] samples . . . required by [the DNA Act] have not already been taken from any [qualifying] person, . . . the prosecuting attorney shall notify the court orally on the record, or in writing, and request that the court *order* collection of the [DNA] samples However, a failure by the prosecuting attorney or any other law enforcement agency to notify the court shall not relieve a person of the obligation to provide [the DNA] samples[.]” (§ 296, subd. (e), italics added.)

Nonetheless, in the event the prosecutor fails to notify the court, “[p]rior to final disposition or sentencing in the case the *court shall inquire and verify* that the [DNA] samples . . . have been obtained and that this fact is included in the abstract of judgment or dispositional order in the case of a juvenile. The abstract of judgment issued by the court shall indicate that *the court has ordered the person to comply* with the requirements of [the DNA Act] and that the person shall be included in the state’s DNA and Forensic Identification Data Base and Data Bank program and be subject to this [Act].” (§ 296, subd. (f), italics added.)

“However, failure by the court to verify [DNA] sample . . . collection or enter these facts in the abstract of judgment or dispositional order in the case of a juvenile shall not invalidate an arrest, plea, conviction, or disposition, or otherwise relieve a person from the requirements of this [Act].” (§ 296, subd. (f).)

When subdivisions (e) and (f) of section 296 are considered in conjunction with subdivision (a)(1)(B) of section 296.1, the inference necessarily arises that the DNA Act obligates the trial court to order DNA sampling if the court learns upon inquiry that the qualifying person has not already submitted such samples or is unable to determine the samples were collected.

Although subdivision (f) of section 296 does not explicitly discuss such a duty, the existence of a mandatory duty at sentencing for the trial court to order a convicted

defendant to submit DNA sampling necessarily flows from the language of subdivision (f) itself, which requires that “[p]rior to . . . sentencing in the case the court shall *inquire and verify* that the [DNA] samples . . . have been obtained” and that “[t]he abstract of judgment issued by the court shall indicate that *the court has ordered* the person to comply with the requirements of [the DNA Act].” (§ 296, subd. (f), italics added.) The significance of this language is that if upon inquiry, the court learns no DNA samples were submitted, then the court shall order the defendant to submit such samples. Similarly, the court also shall make this order if the court inquires but is unable to verify whether DNA samples were obtained.

A contrary conclusion is not compelled by reason of section 296 of subdivision (f)’s admonition: “However, *failure by the court to verify* [that DNA samples were obtained] *or* [to] *enter these facts in the abstract of judgment* . . . shall not invalidate an arrest, plea, [or] conviction, . . . , or otherwise relieve a person from the requirements of [the DNA Act].” (§ 296, subd. (f), italics added.) This language does not speak to the existence or nonexistence of a duty on the part of the trial court to order DNA sampling in sentencing.

Rather, the import of this language is simply to foreclose a challenge to the arrest, plea, conviction or compliance with the requirement of DNA sampling where the trial court either omitted to verify whether the qualifying person had already submitted DNA samples or where the court failed to “enter these facts in the abstract of judgment.” “[T]hese facts” refer to: (1) the fact that DNA samples already had been obtained, or, alternatively; (2) the facts that the court ordered DNA sampling; (3) the fact that the qualifying person shall be included in the state’s DNA and Forensic Identification Data Base and Data Bank program; and (4) the fact such person shall be subject to the DNA Act.

In the absence of an abstract of judgment reflecting a court order for DNA sampling, the Department of Correction is charged with the duty to obtain such DNA samples from a qualifying person who is confined or in custody after conviction or adjudication; who is on probation, parole, or other release; or who is a parole violator or

returned from custody for other enumerated reasons *if the Department of Justice samples of such person are not already in the possession of the Department of Justice DNA Laboratory or recorded as part of its “DNA databank program.”* (§ 296.1, subd. (a)(2)(A)(ii), (3)(A)(ii), & (4)(A)(ii), italics added.)

“Abstracts of judgment in matters imposing imprisonment in state prison are orders sending the defendant to prison and imposing the duty upon the warden to carry out the judgment. [Citations.]” (*People v. Hong, supra*, 64 Cal.App.4th at p. 1076.) The order for a qualified person to submit to DNA sampling and the concomitant abstract of judgment thus serve to relieve the DOC, *as to this particular person*, of the administrative and possibly protracted task of determining whether his DNA samples are already in the possession of the DNA Laboratory or recorded in the DNA data bank program. In so doing, the court order serves to promote expeditious collection of DNA samples, an express goal of the DNA Act and Prop. 69.

As we have explained, what the abstract of judgment recites or does not recite, however, cannot affect the judgment, because it is not part of the judgment and “ ‘it cannot add to or modify the judgment which it purports to digest or summarize.’ [Citation.]” (*People v. Mesa, supra*, 14 Cal.3d at p. 471.) The omission of the abstract of judgment to recite the trial court ordered the qualifying person to submit DNA samples therefore does not operate to negate or nullify the court’s order for DNA sampling.

Furthermore, interpreting subdivision (f) of section 296 as imposing a duty on the trial court as part of sentencing to require a qualifying person to submit DNA samples is not only consistent with but serves to further the intent and purpose of the DNA Act for *all* qualifying persons to submit DNA samples and to promote “the *expeditious and accurate* detection and prosecution of individuals responsible for sex offenses and other crimes[.]” (§ 295, subd. (c), italics added.)

A comparison of subdivisions (d) and (e) of former section 296 with subdivisions (e) and (f) of current section 296 also leads to the conclusion that the voters’ intent was to require, as part of sentencing, the trial court to order a qualified person to submit to DNA sampling.

Under the DNA Act as enacted and amended, “[t]he Department of Justice [is charged with] implementing [the DNA Act].” (§ 295, subd. (h); former § 295, subd. (e).) Pre-Prop. 69, subdivisions (d) and (e) of former section 296 read: “At sentencing or disposition, the *prosecuting attorney* shall verify in writing that the requisite samples are required by law, and that they have been taken, or are scheduled to be taken before the offender is released on probation, or other scheduled release. However, a failure by the prosecuting attorney or any other law enforcement agency to verify sample requirement or collection shall not relieve a person of the requirement to provide samples.” (Former § 296, subd. (d), italics added.) “The abstract of judgment issued by the court shall indicate that the court has ordered the person to comply with the requirements of [the DNA Act] and that the person shall be included in the state’s DNA [Program] and be subject to [the DNA Act].” (Former § 296, subd. (e).)

The above subdivisions were revised by Prop. 69 to provide that “at any stage of court proceedings the prosecuting attorney . . . shall . . . *request the court order* collection of the [DNA] samples” after notifying the court that such samples had not been taken already. (§ 296, subd. (e), italics added.) Nonetheless, if the prosecuting attorney fails to do so, “[p]rior to final disposition or sentencing in the case the court shall inquire and verify” whether the DNA samples “have been obtained” and “[t]he abstract of judgment issued by the court shall indicate that *the court has ordered* the person to comply with the requirements of [the DNA Act] and that the person shall be included in the state’s DNA [Program] and be subject to [the DNA Act].” (§ 296, subd. (f), italics added.)

Prop. 69 thus clarified that the court must order the qualified person submit to DNA samples whenever the court is alerted “at any stage of court proceedings” or upon its own inquiry at sentencing or final disposition that either this person has not provided DNA samples or it cannot be ascertained whether such samples have been provided.

d. *DNA Sampling Order Not Advisory and Inconsequential.*

We are aware that other appellate authority has characterized an order for DNA sampling to be advisory in nature, and thus, inconsequential. (See *People v. Dial* (2005) 130 Cal.App.4th 657, 661-662 (*Dial*).)

Our case is distinguishable from *Dial*. In *Dial*, appellant was asking for relief in the nature of a mandatory injunction, asking the appellate court to enter an “order” requiring DNA samples “ ‘be rescinded and that any information that may have been obtained as a result of this order be both suppressed and destroyed.’ ” (*Dial, supra*, 130 Cal.App.4th at p. 660.) The trial court in *Dial* did not feel the need to reach the appellant’s argument that any DNA evidence be suppressed and the results destroyed in that the record does not show whether Dial “will be or has been required to submit DNA samples.” (*Ibid.*)

It was in this context that the *Dial* court determined there was “no need to reach the merits of [Dial’s] challenge” as to his requested relief to have rescinded a DNA sampling order. (*Dial, supra*, 130 Cal.App.4th at p. 662.)

The *Dial* case involved a defendant convicted of receiving stolen property (§ 496, subd. (a)) and whose probation was revoked in another case based on the same conduct. Dial claimed that at sentencing, the trial court ordered him to submit DNA samples in violation of his Fourth Amendment right “ ‘to be free of unreasonable governmental intrusion.’ ” (*Dial, supra*, 130 Cal.App.4th at p. 660.) Dial requested this relevant relief: “an ‘order’ requiring DNA samples ‘be rescinded.’ ” (*Id.* at p. 661.)¹⁸

The *Dial* court did not rule on the People’s claim that the appeal was premature in that the record does not show whether Dial “will be or has been required to submit DNA samples.” (*Dial, supra*, 130 Cal.App.4th at p. 660.) Rather, the *Dial* court simply proceeded in the abstract based on a hypothetical “order” directing Dial to submit DNA samples. (*Ibid.*)

¹⁸ Dial also requested this relief: “ ‘[T]hat any information that may have been obtained as a result of this order be both suppressed and destroyed’ (italics added).” (*Dial, supra*, 130 Cal.App.4th at p. 661.) The *Dial* court found there was no need to reach the merits of defendant’s challenge as to this requested relief, because “[n]ot one of [the] authorities or officials [who are charged with administering the DNA Act] is a party to this action so that we or the trial court could grant injunctive relief if persuaded by Dial’s Fourth Amendment claims.” (*Ibid.*)

It was under these circumstances that the *Dial* court stated there was “no need to reach the merits of [Dial’s] challenge” as to his requested relief to have rescinded a DNA sampling order. (*Dial, supra*, 130 Cal.App.4th at p. 662.) The court reasoned in pertinent part: Such an “order” was “more akin to an *advisement*” and the DNA Act’s “requirements that specified persons give DNA samples are, to use the People’s term, ‘*self-executing*’ in that they are mandatory and arise with or without a trial court advisement *or order to that effect*.” (*Id.* at pp. 661-662, italics added.)

The *Dial* court’s reasoning is not persuasive. Initially, we point out that the court was not confronted by an actual order that Dial submit DNA samples. The *Dial* court never determined whether Dial “will be or has been required to submit DNA samples” and proceeded solely based on a hypothetical “ ‘order.’ ” (*Dial, supra*, 130 Cal.App.4th at pp. 660-661.) In the absence of an actual order, there was no ruling to review, and no justifiable issue to adjudicate.

“The ripeness requirement, a branch of the doctrine of justiciability, prevents courts from issuing purely advisory opinions. (See generally *People ex rel. Lynch v. Superior Court* (1970) 1 Cal.3d 910.) It is rooted in the fundamental concept that the proper role of the judiciary does not extend to the resolution of abstract differences of legal opinion. It is in part designed to regulate the workload of courts by preventing judicial consideration of lawsuits that seek only to obtain general guidance, rather than to resolve specific legal disputes. However, the ripeness doctrine is primarily bottomed on the recognition that judicial decisionmaking is best conducted in the context of an actual set of facts so that the issues will be framed with sufficient definiteness to enable the court to make a decree finally disposing of the controversy.” (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170.) In other words, “the ripeness requirement prevents courts from issuing purely advisory opinions, or considering a hypothetical state of facts in order to give general guidance rather than to resolve a specific legal dispute. [Citation.]” (*Hunt v. Superior Court* (1999) 21 Cal.4th 984, 998.)

In view of the above, we conclude the *Dial* court’s pronouncements regarding such a hypothetical order therefore are of no precedential moment. (See *People v.*

Johnson (2006) 142 Cal.App.4th 776, 789, fn. 4 [declining to address defendant's other issues for lack of ripeness and noting "[w]hether any of [his] other issues will be ripe after his new trial is purely speculative"].)

Moreover, the *Dial* court's characterization of a DNA sampling order as "more akin to an advisement" is unsound and arises from a misreading of the DNA Act. By definition, an order is not advisory in nature but rather, a command, i.e., a direction calling for compliance. Black's Law Dictionary (8th ed. 2004) at page 1129, column 2, provides this definition of an "order": "A written direction or command delivered by a court or judge."

A plain reading of the applicable provisions of the DNA Act does not support the *Dial* court's characterization of a DNA sampling "order" as "more akin to an advisement" and "in the nature of an advisement rather than a condition of probation." (*Dial, supra*, 130 Cal.App.4th at pp. 661, 662.) In this regard, the DNA Act provides its "provisions . . . are mandatory and apply whether or not the court *advises* a person . . . that he or she must provide the data bank and database specimens, samples, and print impressions as a condition of probation, parole, or any plea of guilty, no contest, or not guilty by reason of insanity, or any admission to any of the [qualifying] offenses" (§ 296, subd. (d), italics added.)

This quoted language does not signify that an order to submit DNA sampling is in any way advisory. On the contrary, its import is that a DNA sampling order is not subject to the discretion of the trial court or the qualifying person. The reference to "advises" does not inform as to that order. Rather, its significance is to alert the qualifying person that the requirement he submit to DNA sampling is not excused if the trial court fails to advise him of such requirement prior to his adverse plea to or admission of the qualifying offense(s) or his subsequent placement on probation or parole.

Additionally, an order to submit DNA samples is not rendered advisory simply because a qualifying person is required to submit to DNA sampling without a court order. Rather, the purpose of such an order is to facilitate expeditious compliance with the

mandatory DNA sampling requirement by flagging the need for DNA sampling from a particular qualifying person and to act as a safety net to ensure a qualifying person does not slip through the dragnet or fall through the cracks. That the DNA sampling requirement is self-executing therefore does not in any way render inconsequential a defendant's challenge to an order requiring him to submit to DNA sampling.¹⁹

e. *Omission of DNA Sampling Order Unauthorized Sentence.*

As we have explained, Prop. 69 obligates the trial court during sentencing to order a qualifying person who has not already submitted DNA samples to submit to DNA sampling. We conclude the failure to the trial court to comply with this mandatory duty results in an unauthorized sentence.

“[A] sentence is generally ‘unauthorized’ where it could not lawfully be imposed under any circumstance in the particular case.” (*People v. Scott* (1994) 9 Cal.4th 331, 354.) “[T]he ‘unauthorized sentence’ concept constitutes a narrow exception to the

¹⁹ We note that in *People v. McCray* (2006) 144 Cal.App.4th 258, 264, the court rejected defendant's constitutional challenge to the DNA order based in part on *Dial, supra*, 130 Cal.App.4th at page 657. The court pointed out that: “Dial argued his Fourth Amendment rights were violated when the trial court ordered that he comply with the DNA Act. Dial urged on appeal that the order be ‘rescinded.’” ([*Dial, supra*,] 130 Cal.App.4th at p. 661.) Our colleagues in the First Appellate District held that Dial's contention was not cognizable on appeal because (1) the party primarily responsible for collecting and maintaining the DNA sample, the California Department of Justice, was not a party to the criminal trial or appeal, and thus did not have an opportunity to protect its interests, and (2) compliance with the DNA Act is required by law even in the absence of an order from the trial court, and no relief from the statutory requirement could be awarded on direct appeal. ([*Dial, supra*,] at pp. 661-662.)” (*People v. McCray, supra*, 144 Cal.App.4th at p. 264.)

Rather than adopting *Dial*'s second rationale, however, the *McCray* court simply concluded: “Defendant's argument on the merits differs from that in *Dial*, but the procedural impediment is the same. Defendant is seeking to prohibit the California Department of Justice from international disclosure of defendant's DNA sample. However, the Department of Justice is not a party to this appeal and cannot be enjoined from acting in this manner urged by defendant. The relief sought by defendant in this direct appeal is not available. (*People v. Dial, supra*, 130 Cal.App.4th at p. 662.)” (*People v. McCray, supra*, 144 Cal.App.4th at p. 264.)

general requirement that only those claims properly raised and preserved by the parties are reviewable on appeal. [Citations.]” (*Ibid.*) Review is not foreclosed due to lack of objection, because “obvious legal errors at sentencing that are correctable without referring to factual findings in the record or remanding for further findings are not waivable.” (*People v. Smith, supra*, 24 Cal.4th at p. 852.) On the other hand, a discretionary sentencing decision may not be challenged on appeal in the absence of an objection below. (*Scott, supra*, at p. 354.) “[T]he general forfeiture doctrine applies and failure to timely object forfeits review [in that] ‘[r]outine defects in the court’s statement of reasons are easily prevented and corrected if called to the court’s attention.’ [Citations.]” (*People v. Stowell* (2003) 31 Cal.4th 1107, 1113.)

In an analogous situation, an appellate court concluded: “The trial court has no discretion in the matter; the order for the AIDS blood test is mandatory. (§ 1201.1, subd. (a); *People v. McVickers* (1992) 4 Cal.4th 81, 83.) The trial court’s sentence omitting the order for an AIDS test was unauthorized and subject to correction at any time. [Citations.]” (*People v. Barriga* (1997) 54 Cal.App.4th 67, 70.)

In contrast, a sentence is not unauthorized where the court fails to make an on the record statutorily required HIV probable cause finding and the corresponding notion of such finding on the docket. The trial court is required to order a defendant convicted of certain enumerated sexual offenses to submit to AIDS/HIV testing. (§ 1202.1, subd. (a).)

Unlike the other sex offenses listed in subdivision (e) of section 1202.1, the offenses enumerated in subdivision (e)(6)(A) “can be committed without establishing the medical predicate for possible HIV contraction -- the transference of bodily fluids. [Citations.] A finding of probable cause to believe such transference has occurred is therefore necessary to establish the nexus between that medical predicate and an HIV testing order consistent with the defendant’s constitutional rights [citation]” (*People v. Stowell, supra*, 31 Cal.4th at p. 1116.) “[T]he court shall note its finding on the court docket and minute order if one is prepared.” (§ 1202.1, subd. (e)(6)(B).)

In *Stowell*, defendant claimed for first time on appeal that the HIV testing order was invalid, because the trial court failed to make an express probable cause finding and

to note that finding in the docket or minutes. Our Supreme Court concluded defendant forfeited his claims of error by failing to make a timely objection below.

The court pointed out that “the statute neither requires an *express* finding (cf. Pen. Code, § 1385, subd. (a)) nor contains any sanction for noncompliance. [Citations.]” (*People v. Stowell, supra*, 31 Cal.4th at p. 1114, italics added.) The court found applicable the general principle that “where a statement of reasons is not required and the record is silent, a reviewing court will presume the trial court had a proper basis for a particular finding or order. [Citation.]” (*Id.* at p. 1114.) The court found inconsequential the absence of the notation: “With respect to notation of the probable cause finding in the docket, nothing in the statutory language or the legislative history indicates the Legislature intended to make validity of HIV testing dependent on an essentially ministerial act.” (*Id.* at p. 1115, fn. omitted.)

The court held that “absent an objection in the trial court, a defendant forfeits appeal of any deficiency in the statutorily required finding supporting an HIV[, i.e., AIDS’] testing order pursuant to . . . section 1202.1, subdivision (e)(6) or a notation of that finding in the docket or minutes.” (*People v. Stowell, supra*, 31 Cal.4th at p. 1117, fns. omitted.)

Prior to finding forfeiture, the court first recounted the settled principles applicable to unauthorized sentences set forth in *Scott* and *Smith*, but did “not adopt the analytical template of *Scott* and *Smith* for issues arising under . . . section 1202.1.” (*People v. Stowell, supra*, 31 Cal.4th at p. 1113.) Rather, the court concluded: “Since HIV testing does *not constitute punishment* [citation], it cannot properly be considered a sentencing choice. While the order is made *at the time sentence is imposed, the Legislature enacted section 1202.1 and related HIV testing statutes as health and safety measures to combat the spread of AIDS, not to increase criminal penalties.* [Citations.] *Instead, we conclude that the general forfeiture rationale applies, and on that basis hold that the failure to make an express finding of probable cause and to note that finding in the docket is not subject to review absent a timely objection.*” (*Ibid.*, italics added.)

Submission of DNA samples also does not constitute punishment and is not required to increase criminal penalties. Nonetheless, we conclude that the principles applicable to unauthorized sentences rather than general forfeiture principles apply in this instance. *Stowell, supra*, is factually distinguishable for the following reasons. First, the DNA Act mandates that during sentencing, the trial court order DNA sampling, and thus, there is a direct nexus between sentencing and the ordered DNA sampling. Second, in *Stowell*, the trial court had ordered AIDS testing. Also, the claims of error raised in *Stowell* did not implicate the validity of the order in that the *Stowell* court concluded the viability of the order was not contingent on an express probable cause finding or a notation of such finding on the docket.²⁰ Thus, the *Stowell* court was not confronted with the issue of whether the trial court's *failure to order* AIDS testing was an unauthorized sentence.²¹

²⁰ In *McCray*, the court found review of defendant's constitutional challenge was foreclosed by the general forfeiture rule, because defendant had failed to object to the trial court's DNA order on any ground. Citing *Stowell* as authority, the *McCray* court reasoned the " 'unauthorized sentence' " exception to that rule was inapplicable, since "the DNA order was not a punishment." (*People v. McCray, supra*, 144 Cal.App.4th at p. 263.) Inasmuch as *McCray* did not involve the omission of a mandatory DNA sampling order, we have no occasion to address that court's reasoning.

We note, however, that several appellate courts have held an order requiring the submission of DNA samples from a defendant who was not convicted of a qualifying offense constituted an unauthorized sentence. (*People v. Walker* (2000) 85 Cal.App.4th 969, 971, 974 [review den.]; *People v. Sanchez* (1997) 52 Cal.App.4th 997, 1000, fn. 4; see also, *In re Derrick B.* (2006) 39 Cal.4th 535, 547 [dispositional order requiring juvenile to register as sex offender overturned, because "juvenile offender may not be ordered to register as a sex offender under . . . section 290 if his offenses are not among those listed in subdivision (d)(3)" (*In re Derrick B.*, at p. 537, fn. omitted)].)

²¹ We note that in a companion case, our Supreme Court concluded that a lack of objection did not foreclose review of defendant's claim that the HIV testing order was not supported by substantial evidence: "Just as a defendant could appeal an HIV testing order, without prior objection, on the ground he had not been convicted of an enumerated offense (see, e.g., *People v. Green* (1996) 50 Cal.App.4th 1076, 1090; *People v. Jillie* (1992) 8 Cal.App.4th 960, 963), he should be able to do so on the ground the record does not establish the other prerequisite, probable cause. We perceive no basis for

CONCLUSION

The DNA Act's purpose and intent include "the expeditious and accurate detection" of "all persons" who committed or attempted to commit a qualifying offense though the mandate that these and other qualifying persons submit to DNA sampling. In order to implement and further such purpose and intent, we construe subdivision (f) of section 296 as mandating the trial court in sentencing to order a defendant (who has not already done so) to submit DNA samples. A contrary construction would impermissibly thwart the voters' intent and purpose. (See *People v. Mendoza*, *supra*, 23 Cal.4th 896, 908.)

Although the DNA sampling requirement is self-executing, a court's order for DNA sampling is not advisory in nature. Rather, the purpose of such court order is to facilitate the expeditious collection of DNA samples from a qualifying person and to aid in ensuring a qualifying person does not slip through the cracks. Although submission of DNA samples is not punishment or an increased penalty, the failure to make such an order constitutes an unauthorized sentence, which may be corrected at any time.

The record does not reflect the trial court ordered appellant to submit to AIDS testing, which is mandatory based on his convictions of sodomy and oral copulation. (§ 1202.1.) The trial court's failure to order AIDS testing is an unauthorized sentence. (*People v. Barriga*, *supra*, 54 Cal.App.4th at p. 70.) Accordingly, the judgment must be modified to reflect appellant is ordered to submit to AIDS testing, and an amended abstract of judgment must be prepared to reflect this order.

DISPOSITION

The judgment is reversed as to appellant's convictions in counts 6 through 9. Appellant is ordered to submit to DNA sampling and to AIDS testing and to pay a security fee in the amount of \$120, consisting of a \$20 security fee on each of his

distinguishing between the two statutory predicates." (*People v. Butler* (2003) 31 Cal.4th 1119, 1126; cf. *People v. Scott*, *supra*, 9 Cal.4th at p. 354 ["[C]laims deemed waived on appeal involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner"].)

convictions in counts 1 through 9 and count 10. The cause is remanded for resentencing. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

CROSKEY, Acting P. J

. KITCHING, J.